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No. 87-1150

In The
# Supreme Court of the United States
October Term, 1987

MARION S. BARRY, JR., et al.,
*Petitioners,*
v.
UNITED STATES OF AMERICA, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF THE STATES OF CALIFORNIA, ILLINOIS, MARYLAND, OHIO, SOUTH CAROLINA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE

The State of California, through its Attorney General John K. Van de Kamp, and the States of Illinois, Maryland, Ohio, South Carolina and Wyoming, through their respective Attorneys General, respectfully submit this brief as amici curiae in support of petitioners pursuant to Supreme Court Rule 36.4.

Amici urge this Court to grant the Petition for Writ of Certiorari herein, and then, by reversing the decision

of the Court of Appeals and reinstating the judgment of the district court, reaffirm that public employers may voluntarily adopt bona fide affirmative action plans to remedy the effects of past discrimination without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* [Title VII].

Amici believe that the Court of Appeals' majority misconstrued this Court's decision last year, *Johnson v. Transportation Agency, Santa Clara County,* — U.S. —, 107 S.Ct. 1442 (1987), as well as this Court's other affirmative action decisions. The Court of Appeals thereby jeopardized amici's interest both in preserving the ability of public employers to take effective action to eliminate the impact of past discrimination on their own work forces and in safeguarding voluntary compliance by public employers with federal and state laws forbidding employment discrimination. Many of amici have themselves initiated voluntary affirmative action programs to remedy the effects of past discrimination, and amici also encourage voluntary compliance with state fair employment statutes, including, in appropriate cases, the use of bona fide affirmative action plans.

Amici therefore urge this Court to accept review of the instant case.

## SUMMARY OF ARGUMENT

This case concerns the validity under Title VII of an affirmative action plan adopted by the District of Columbia in order to increase the percentage of black firefighters in the District's Fire Department. Review by this Court is essential because the District of Columbia Circuit Court of Appeals, in an erroneous departure from the prior decisions of this Court, held that the plan violated Title VII. In *Hammon v. Barry*, 813 F.2d 412, *petition for rehearing denied*, 826 F.2d 73 (D.C. Cir. 1987), the appellate court misconstrued Title VII and misapplied this Court's decision in *Johnson*, thereby creating unwarranted and unworkable barriers to affirmative action efforts by public employers.

First, the court failed to recognize what facts constitute a firm basis upon which to predicate the adoption of an affirmative action plan. Recent steps undertaken to eliminate the vestiges of discrimination, though commendable, do not negate the justification for additional efforts where, as here, the percentage of blacks in the District's Fire Department is substantially below the percentage of qualified black applicants, as well as the percentages of blacks employed by the District or in the District's own labor pool.

Other errors are the court's determination that the district's affirmative action plan was not properly designed, and the court's misplacement of the burden of proof as to the validity of the plan. Reserving a specific number or percentage of positions, for a limited period of time, is an appropriate means to eliminate the residual

effects of discrimination, and the rate that black applicants passed the examination is a reasonable goal to select for the hiring rate for blacks. Under the District's plan, the percentage of blacks who are hired (60 percent) will still be below the application rate for blacks (65 percent). Therefore, opponents of the plan cannot meet their burden of demonstrating that the plan unduly affects or bars the advancement of non-blacks, who will still be hired at a rate which exceeds their application rate.

Finally, the decision below improperly curtails voluntary efforts by public employers to remove vestiges of discrimination. Public employers should be leaders in correcting manifest imbalances in their own work forces, and must not be required to either admit or be adjudged guilty of past discrimination in order to initiate remedial efforts. This nation is dedicated to eliminating employment discrimination, and public employers must be permitted to take effective action in order to accomplish this purpose.

———o———

## ARGUMENT

### I. REVIEW IS REQUIRED TO CLARIFY THAT RACE-CONSCIOUS REMEDIAL EFFORTS ARE JUSTIFIED WHERE, AS HERE, BOTH A HISTORY OF DISCRIMINATION AND A SIGNIFICANT DISPARITY BETWEEN QUALIFIED APPLICANTS AND EMPLOYEES EXIST

Unquestionably, an employer's decision to adopt an affirmative action plan in which race is used to make hir-

ing decisions[1] must be supported by facts which show that such remedial action is warranted. The nature of this factual predicate is one of the major issues which must be addressed by the Court herein. The trial court, applying the criteria outlined in *Steelworkers v. Weber*, 443 U.S. 193 (1979), for evaluating affirmative action plans according to Title VII requirements, concluded that "a justification for corrective race-conscious remedies such as those contained in the hiring aspects of the plan" existed, *Hammon v. Barry*, 606 F.Supp. 1082, 1092 (D.D.C. 1985), but the Court of Appeals disagreed, despite the additional guidance from this Court in *Johnson*.

*Weber* and *Johnson* provide the relevant criteria, since the Court of Appeals' reversal rested solely on Title VII,[2] but even if constitutional standards were to be applied,[3] the facts of this case show that "the employer had a strong basis in evidence for its conclusion that re-

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1. Only the hiring provisions of the District's plan are now in question. 813 F.2d at 419.

2. The decision denying rehearing specifies that the court's invalidation of the plan rests upon Title VII law, 826 F.2d at 76 (Starr, J., for the Court) and 88 (Mikva, J., dissenting), but the district court held that the plan satisfied both Title VII and constitutional requirements, 606 F.Supp. at 1096. One judge on the appellate panel would have held it satisfied neither. 826 F.2d at 82 (Silberman, J., concurring).

3. "Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause." (*Johnson*, 107 S.Ct. at 1446 n.2.) Title VII's standard does not "extend as far as that of the Constitution." (*Id.* at 1450 n.6.)

Equal protection standards are applicable to the District pursuant to the due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

medial action was necessary." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). As further explained by Justice O'Connor, "the public actor [must have] a firm basis for believing that remedial action is required." *Id.* at 286 (O'Connor, J., concurring).

An affirmative action plan was held to be justified in *Weber* because it was "designed to break down old patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 209. As further explained in *Johnson*, an employer "need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.'" *Johnson*, 107 S.Ct. at 1451 (quoting *Weber*, 443 U.S. at 209). *Johnson* also describes the requisite factual basis as "evidence of a 'manifest imbalance.'" *Id.* at 1452. Evidence which has been cited as relevant to a determination that race-conscious efforts are warranted includes widespread discrimination within a particular type of employment, *Weber*, 443 U.S. at 199,[4] and a disparity between the percentage of a group in an employer's work force as a whole and the percentage in the particular positions in question, *Johnson*, 107 S.Ct. at 1446.

The court below paid lip service to *Weber* and *Johnson*, but in reality imposed a much more stringent standard

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4. Just as this Court took judicial notice in *Weber* of the numerous incidents of craft union discrimination, *Weber*, 443 U.S. at 199 n.1, similar notice may be taken of the widespread discrimination within fire departments. *See, e.g., Firefighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, (1986); *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3rd Cir. 1983), *Association Ag'st Discrimination v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); and *City and County of San Francisco v. Fair Employment & Housing Com.*, 191 Cal.App.3d 976, 236 Cal.Rptr. 746 (1987).

for justifying an affirmative action plan—a standard which an employer could virtually never satisfy without either admitting or being found guilty of past discrimination. Indeed, the court emphasized the fact that the District is neither "a self-confessed discriminator," nor "a lawless, obdurate bastion of blatantly discriminatory practices." 813 F.2d at 427. This language, which implies that only admitted or adjudged violators may institute affirmative action plans, is contrary to the lesson in *Johnson* that findings or admissions of discrimination are not prerequisites because such requirements would severely impair voluntary action. *Johnson*, 107 S.Ct. at 1451 n. 8.

Furthermore, the fact that successful remedial efforts began in 1981, after a finding of prior discrimination was made by a civil rights agency, was used by the court below to negate the justification for additional efforts, and the District's historical segregation was dismissed as "semi-ancient history." 813 F.2d at 428 n. 32. This cavalier rejection of the District's past discrimination, and undue reliance upon the District's unfinished remedial efforts, reveal that the court below failed to understand that voluntary efforts to remediate past discrimination are to be encouraged, not undermined.

The decision below also ignores the fact that without the affirmative action plan, the District faced a serious risk of being found guilty of employment discrimination. The stipulated facts (Court of Appeals' Appendix 2-24) reveal that 99 percent of white applicants, but only 79 percent of black applicants passed the entry level examination (Fact No. 25). Also, 65 percent of applicants were black and 30 percent white, while 60 percent of the persons who passed the exam were black and 35 percent

were white (Fact No. 24). Furthermore, as of 1984, only 38 percent of the uniformed members of the Fire Department were black, while 62 percent were white (Fact No. 5). The 1984 examination was not linked to successful job performance (Fact No. 28), and if the District had used the examination results to rank order candidates, even greater disparity would have resulted (Fact No. 27.) Black applicants sued to prohibit the use of the 1984 examination, *Hammon v. Barry*, C.A. 84-0903, and, if a consent decree had not been entered which included an agreement to adopt an affirmative action plan, the Hammon plaintiffs may well have succeeded in proving disparate impact discrimination under the reasoning of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).[5]

The District of Columbia's own work force is 70 percent black and the labor pool within the district is 64 percent black (Fact No. 2), even though the work force in the surrounding Washington Standard Metropolitan Statistical Area (WSMSA) is 29 percent black (Fact No. 3). The uniformed members of the Fire Department are 38 percent black, which, if measured merely against WSMSA figures, as the Court of Appeals insisted, fails to reveal the obvious disparities between both qualified applicants and overall District employment, as compared to fire-

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5. Prior to 1980, the District used "Test 21" to screen applicants. As is clear from this Court's analysis of that test in *Washington v. Davis*, 426 U.S. 229 (1976), that test, though not violating constitutional standards, would likely fail to pass muster under the disparate impact theory of *Griggs*.

In 1980, the District used an entry-level examination for firefighters which was determined to have an adverse effect upon black applicants and which was not validated (Fact No. 18). The 1984 examination at issue herein is substantially the same as the 1980 examination.

fighters. The Court of Appeals reasoned that no evidence of discrimination or basis for remedial action existed because the percentage of black firefighters exceeds the percentage of blacks in the WSMSA work force, but this analysis ignores the lesson of *Connecticut v. Teal*, 457 U.S. 440 (1982), which rejects such a "bottom line" approach to an adverse impact claim. Title VII guarantees equality of employment opportunities, and "[w]hen an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity . . . ." *Id.* at 448. Here the 1984 examination is a barrier which, absent affirmative action efforts, would disproportionately affect black applicants. Since qualified black applicants would be denied employment at a disproportionate rate, based upon an unvalidated test, a *Griggs*-type problem would exist.[6]

Furthermore, as this Court explained in *Hazelwood School District v. United States*, 433 U.S. 299, 312 (1977), the trial court is in the best position to determine the significance of various statistics, and here the trial court determined that applicant flow data was the relevant figure to consider, 606 F.Supp. at 1092. The trial court's determination that the statistical evidence, together with the prior administrative finding of discrimination, justified race-conscious steps should be affirmed.

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6. Unless the District is permitted to undertake remedial steps, its statistics will be much worse than those found to establish a prima facie violation of Title VII in *Connecticut v. Teal*, where the employer at least adjusted the overall result in an effort to avoid any disparate impact.

If the reasoning below remains uncorrected, a Catch-22 situation will exist in which voluntary affirmative action efforts will be an option available only for those employers—the "bastions" of discrimination—least likely to adopt such plans, while those employers who wish to act in good faith will be effectively barred from voluntary remedial action. Public employers wishing to remove vestiges of discrimination within their work force without admitting or being found guilty of past discrimination should not be virtually precluded from initiating remediation efforts.

## II. REVIEW IS REQUIRED TO PRESERVE THE VALIDITY OF AFFIRMATIVE ACTION PLANS WHICH MATCH HIRING PERCENTAGES TO QUALIFIED APPLICANT PERCENTAGES

After erronously concluding that no factual basis existed to justify affirmative action efforts, the Court of Appeals compounded this error by objecting to the methods used in the race-conscious hiring scheme adopted by the District and approved by the trial court. Once again, the Court of Appeals failed to heed the lesson of *Weber* and *Johnson*.

The criteria for a bona fide plan, once the predicate for a plan exists, are that the plan "does not unnecessarily trammel the interests of the white employees," does not "create an absolute bar to the advancement of white employees," and is "a temporary measure." *Weber*, 443 U.S. at 209. *See also Johnson*, 107 S.Ct. at 1455-1456. Unquestionably, efforts to remedy past discrimination may, in the short run, benefit or disadvantage some individuals who were themselves neither advantaged nor dis-

advantaged by the prior practices. This temporary result of remedial efforts does not violate Title VII. And, even if stricter constitutional standards, requiring plans to be narrowly tailored to serve remedial purposes, were to be applied, the District's adoption of hiring goals would be valid. As explained in *Wygant*, 476 U.S. at 280-281 (plurality opinion):

> "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."

Upon proper analysis, it is clear that the District's plan does not impermissibly burden innocent persons. First of all, the provisions of the plan now in issue solely concern hiring, and, as further explained by the plurality in *Wygant*, 476 U.S. at 282-283:

> "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."

At most, white applicants have lost an expectation they might be hired, and this expectation was based upon a test which appears to be invalid. This loss is not entitled to statutory or constitutional protection at the expense of remedial action.

Unlike *Johnson*, but similar to *Weber*, the District's plan establishes a hiring percentage, which the Court of Appeals criticized as "a hard-core, cold-on-the-docks

quota, nothing less." 826 F.2d at 79. The lesson of *Johnson*, however, is that reserving a certain number of positions as part of an affirmative action plan is legitimate provided that this portion of the plan is of limited duration. As this Court explained:

> "Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, *e.g., Firefighters, supra*, 478 U.S., at —, 106 S.Ct., at — (four-year duration for consent decree providing for promotion of particular number of minorities); *Weber*, 443 U.S., at 199, 99 S.Ct., at 2725 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force)." *Johnson*, 107 S.Ct. at 1456.

Here, the District's plan is limited both in time and in scope of application. It only applied to the 1984 examination, and to those who passed the examination, and it was designed to last only two years. These limitations ensure that the plan will not unduly burden innocent persons.

The trial court selected the pass rate of black applicants (60 percent) as the hiring goal, since this figure best represents the qualified applicant pool. This information as to the pool of qualified applicants is often not available, so other work forces statistics must be substituted. *Hazelwood School District*, 433 U.S. at 308 n. 13. Also, the existing applicant pool sometimes inadequately reflects the potential applicant pool, if qualified persons are discouraged from applying. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977). Here, however, qualified black applicants are readily identified, and the disparities be-

tween applicants and employees, and between applicants and new hires if the examination were to be used in rank order, are obvious. Therefore, the selection of the pass rate for blacks as the appropriate hiring goal is fully supported by the record.

Finally, the Court of Appeals' conclusion that the plan is not sufficiently narrowly tailored is belied by this Court's recognition in *Wygant* that hiring goals are a "less intrusive means", *Id.*, 476 U.S. at 283, to remedy racial discrimination. The District's plan is a legitimate means of accomplishing its goals of hiring critical employees while at the same time eliminating the residual effects of discrimination. Moreover, at the same time the plan was in effect, a valid examination was to be developed. The temporary, race-conscious hiring procedure should have been upheld as a bona fide affirmative action plan.

## III. REVIEW IS REQUIRED TO SAFEGUARD VOLUNTARY REMEDIAL PLANS AND TO ENSURE THAT THE BURDEN OF SHOWING SUCH PLANS ARE NOT VALID RESTS UPON THOSE CHALLENGING THE PLAN.

Perhaps the greatest danger of the appellate court's decision is the barriers it raises to voluntary affirmative action efforts by public employers. The effect of the decision, if left uncorrected, will be to deter public employers from initiating steps to correct significant imbalances within their own work forces, and to make it much more difficult for those public employers which do adopt legitimate affirmative action plans to defend themselves against challenges to those plans.

Time and time again this Court has recognized the importance of voluntary efforts to achieve the goals of Title VII. As stated most recently in *Johnson*, 107 S.Ct. at 1451:

> "[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts."

*See also Firefighters v. Cleveland*, 106 S.Ct. at 3072 ("We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."), and *Weber*, 443 U.S. at 204-205.

The desirability of voluntary efforts may be even greater for governmental employers than for the private sector. As Justice O'Conner stated in *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring):

> "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance."

The decision below seriously impairs the ability of public employers to adopt voluntary plans, because it effectively limits such efforts to "self-confessed discriminator[s]" and "lawless, obdurate bastion[s]" of discrimination. 813 F.2d at 427. Few public employers will willingly acknowledge themselves as falling within one of these categories in order to justify affirmative action efforts.

An additional deterrent created by the decision below is its misallocation of the burden of proof once an affirmative action plan is challenged. According to the Court of Appeals' majority, the employer must prove the requisite factual predicate and the validity of the plan's provisions. 813 F.2d at 413 and 431-432. This Court has explained, however, that those challenging an affirmative action plan bear the burden of establishing the invalidity of the plan. *Johnson*, 107 S.Ct. at 1449. *See also Wygant*, 476 U.S. at 277-278 (plurality opinion) ("The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program.")

This allocation of the burden of proof is consistent with the analytical process established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973), since an affirmative action plan is a nondiscriminatory rationale for an employment practice which would otherwise be unlawful. As explained in *Johnson*, 107 S.Ct. at 1449:

> "If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . The burden of proving [the plan's] invalidity remains on the plaintiff."

The court below misplaced this burden of proof, and nowhere determined that those objecting to the plan had proven its invalidity. This error alone warrants reversal of the Court of Appeals' conclusion.

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## CONCLUSION

Since voluntary compliance is so important in achieving the goals of Title VII, and since public employers both serve as role models and actually affect the shape of the labor market by their own employment practices, this Court needs to emphasize once again that remediation of prior discrimination is to be encouraged, not deterred, and that bona fide affirmative action plans are a legitimate means to eliminate the vestiges of discrimination.

For the foregoing reasons, amici urge this Court to grant the Petition for Writ of Certiorari.

DATED: May 6, 1988

Respectfully submitted,

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